UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

**CHIP'S WETHERSFIELD, LLC d/b/a/
CHIP'S FAMILY RESTAURANT**

and **Case 01–CA–217597**

**JACQUELINE RODRIGUEZ,
AN INDIVIDUAL**

Alan L. Merriman, Esq., and
Thomas E. Quigley, Esq.,
for the General Counsel.
David A. Ryan, Esq., and
Eric Desmond, Esq.,
New Haven, Connecticut,
for the Respondent.
Thomas John Durkin, Esq.,
Hartford, Connecticut,
for the Charging Party

DECISION

STATEMENT OF THE CASE

ELIZABETH M. TAFE, Administrative Law Judge. This case was tried in Hartford, Connecticut, on November 5 and 6, 2018. Jacqueline Rodriguez, an individual charging party, filed the charge on April 2, 2018, and amended the charge on May 24, 2018. The Acting Regional Director for Region 1, Subregion 34, of the National Labor Relations Board (Board or NLRB) issued the Complaint on July 18, 2018. The Complaint alleges that Chip's Wethersfield, LLC d/b/a Chip's family restaurant (Respondent or Employer) violated Section 8(a)(1) of the National Labor Relations Act (Act) by discharging Rodriguez because she engaged in protected concerted activities and also by prohibiting employees from discussing work-related incidents with other employees. The Respondent filed a timely answer in which it denied committing any of the violations alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a restaurant in Wethersfield, Connecticut, where it annually derives gross revenues in excess of $500,000, and purchases and receives goods valued in excess of $50,000 directly from points outside the State of Connecticut. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. FACTS

1. Background

The Respondent, a restaurant business, has six locations in Connecticut, including the Wethersfield restaurant where the events at-issue in this case took place. Jacqueline Rodriguez – the charging party and alleged discriminatee – worked for the Respondent for 3 years starting in October 2014. During most of that time she was a server waiting on tables, but the Respondent promoted her to manager in the Summer of 2016 and she worked in that position for 3 to 4 months before choosing, for personal reasons, to return to a server position.

2. Issues Between Assistant Manager Olden and Staff, Events of October 2, and Discharge of Rodriguez

In the summer of 2017, the Respondent hired a new assistant manager – Santosha[1] Olden – to join another assistant manager, Joel Martinez, at the Wethersfield restaurant. When Olden started working, George Chatzopoulos, the Respondent's owner,[2] told Olden and Rodriguez that Olden should direct questions about how the restaurant operated to Rodriguez who was familiar with such matters from her previous service as an assistant manager. From the start of Olden's tenure, she found herself at odds with some members of the staff. Ashely Curtis, a server who is still employed by the Respondent, credibly testified that the servers complained about Olden because she was not paying attention to what was going on in the restaurant, took her own breaks at the busiest times of day, would stay in the office instead of helping on the floor, and was treating server Denise Bachand unfairly. D. Bachand[3] herself complained to Robertson about how Olden was treating her. (Transcript page(s) (Tr.) 198-199.)

Charging Party Rodriguez complained to Chatzopoulos about Olden's management of the restaurant on multiple occasions beginning in August 2017. Rodriguez told Chatzopoulos that

[1] This name provokes a variety of spellings in the record – including Santacha and Santasha. I use the spelling that appears in the Complaint in a paragraph that the Respondent admitted.

[2] The record suggests, but does not confirm, that Chatzopoulos' sister, Dina Bajko, is a co-owner of the Respondent and also one of its managers.

[3] D. Bachand's daughter, Ashley Bachand, also worked as a server at the Wethersfield restaurant. D. Bachand, at approximately 60 years of age, was older than most of the servers at the Wethersfield restaurant.

she did not believe that Olden was ready to be left alone to manage the restaurant and that, when possible, Martinez should be present to assist Olden. Chatzopoulos took action consistent with this recommendation. Rodriguez also told Chatzopoulos that Olden created conflicts at the restaurant and delayed unacceptably before performing her duties. She specifically raised the servers' perception that Olden was discriminating against server D. Bachand by, inter alia, reducing the number of tables D. Bachand served, and scrutinizing her work more critically. In addition to talking to Chatzopoulos, Rodriguez asked assistant manager Martinez, who she believed had his own issues with Olden, to discuss this with Chatzopoulos.

In August or September of 2017, Chatzopoulos told Rodriguez that there would be a meeting regarding the concerns that had been raised about Olden. Assistant manager Martinez called the servers together and told them that, in preparation for a meeting, they should prepare a list of their complaints regarding Olden. A group of servers that included Rodriguez, Ashley Curtis, and Tammy Pino, had a 5-minute meeting to create the list. Curtis reduced the servers' complaints about Olden to a written list during the meeting. The list read as follows:

- Has something against Denise
- She doesn't seat guests often, only watches the door
- Always on her phone
- Doesn't help servers when slammed
- Sits & eats during mid rush
- Doesn't check in with guests
- Causes conflict w/ servers
- Sits in the office for extended periods of time
- Is in everyone[']s business in & out of work
- Only acts like a manager when George comes in
- More worried about side work[4] than restaurant
- Doesn't always go to tables w/allergies[5]
- Complains about when she works now much (sic)
- Tries to get other managers to work for her so she can leave early, or not come in

(General Counsel Exhibit (GC Exh.) 3.) Curtis gave credible,[6] uncontradicted, testimony that these issues with Olden's management of the restaurant impacted the working conditions of the servers. In addition, I credit Rodriguez's uncontradicted testimony that, in some instances, Olden would reduce D. Bachand to tears, or would otherwise agitate her to such an extent that other servers had to step in to perform D. Bachand's work. Rodriguez personally delivered the

[4] "Side work" refers to the cleaning and organizing that servers perform at the end of their shifts.

[5] The Respondent's policy is that when a patron informs the server about a food allergy, the server informs the manager who then speaks with the patron.

[6] I found Curtis particularly credible. She is current employee who testified under subpoena and stated during her testimony that she "did not want to be involved in this" and "tried to keep . . . away from this whole situation." She testified in a calm and certain manner. In addition, by testifying against the Respondent's interests she was exposing herself to the risk of retaliation. See *Murray American Energy, Inc.*, 366 NLRB No. 80, slip op. at 8 fn. 6 (2018), *Portola Packaging, Inc.*, 361 NLRB 1316, 1316 fn. 2 (2014), and *Flexsteel Industries, Inc.*, 316 NLRB 745, 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996). A witness' status as a current employee is among the factors that a judge may utilize in resolving credibility issues. See, e.g., *DHL Express, Inc.*, 355 NLRB 1399, 1404 fn. 13 (2010).

servers' list of complaints to assistant manager Martinez. On October 1, Rodriguez, while working at another one of the Respondent's restaurants, spoke with Chatzopoulos, who told her that he had "hired a person who was going to be handling" the issues at the Wethersfield location. This was an apparent reference to the fact that a few days earlier – between September 26 and 30, 2017 – Chatzopoulos hired Anthony Cuozzo to serve as Respondent's chief operating officer (COO).

On October 2, 2017, the incident occurred that led the Respondent to suspend and then discharge Rodriguez. At the relevant time on October 2, Olden, Rodriguez, and D. Bachand were all on-duty at the Wethersfield location. It was approaching the end of the shift and D. Bachand was told, that she was "off the floor" – meaning that she was to take no new customers but would finish up her existing customers and complete the side work. During this time, D. Bachand's former spouse – a regular customer who ate at the restaurant two or three times every week – arrived and asked to be served by D. Bachand. Olden stated that D. Bachand was "off the floor" and refused to allow her to serve the customer. D. Bachand wanted to serve the customer and protested to Olden but did not succeed in changing Olden's mind. The customer chose to walk out of the restaurant rather than be served by someone other than D. Bachand. D. Bachand and Rodriguez discussed D. Bachand's distress over what had happened. Rodriguez believed that this was another example of Olden unfairly disfavoring D. Bachand. Although it was true that servers who were still on the clock but off the floor did not usually take new customers, Rodriguez's experience was that exceptions were made for regular customers who asked to be seated with a particular server. Granting such exceptions was consistent with the value the Respondent placed on regular customers and with its policy, emphasized during a recent training session, that staff should go above and beyond regular service in order to please customers. During a subsequent discussion regarding this event, Chatzopoulos told Rodriguez that if he had been present, he probably would have allowed D. Bachand to serve the regular customer who requested her.[7] (Tr. 80-81.)

After D. Bachand discussed what had happened with Rodriguez, Rodriguez approached Olden to protest what she perceived to be an example of the unfair treatment of D. Bachand that servers had recently complained about.[8] Their conversation took place in the restaurant's "server aisle" – an area that is separated from the dining area by a wall/partition and where they were not within the sight of customers. Servers and managers use the server aisle to talk about workflow

[7] I do not reach a determination about whether Olden was right or wrong to give precedence to the policy about servers who were off the floor over the policy of "above and beyond" customer service. I do, however, credit Rodriguez's testimony that she believed Olden's decision to do so was tainted by animosity towards D. Bachand. As already noted, a group of servers, including Rodriguez, had recently complained to management that Olden had something against D. Bachand.

[8] Rodriguez was the only witness to the October 2 exchange who testified at trial. In the absence of any contrary testimony from a witness to event, I fully credit Rodriguez's account about the incident. That testimony was facially credible and consistent and was not rebutted by any contemporaneous evidence or meaningfully undermined on cross-examination. At trial, Laura Robertson and Anthony Cuozzo – two managers – characterized the October 2 exchange in ways that were contrary to Rodriguez's account and portrayed her as more disruptive. I give Robertson's and Cuozzo's contrary versions no weight regarding what transpired between Rodriguez and Olden on October 2. Not only did neither of them actually witness any part of the exchange, but the Respondent's contemporaneous documentation does not corroborate their assertion that Rodriguez raised her voice at Olden.

and other work-related matters. Rodriguez told Olden that she believed the refusal to allow D. Bachand to serve the customer was inconsistent with the Respondent's "above and beyond" customer service training and also opined that Olden had refused to permit it because the server was D. Bachand. Rodriguez did not raise her voice at any point during the exchange, but Olden reacted by yelling "I'm the manager, I make the decisions." Rodriguez responded that there was going to be a meeting regarding servers' complaints about Olden. After the exchange Rodriguez resumed working and completed her shift. There is no suggestion that Rodriguez or D. Bachand refused any directive from Olden or that they failed to perform any of their duties during the shift. There were no customer complaints indicating that guests had been aware of the exchange.

After the exchange between Olden and Rodriguez, but before Rodriguez finished her October 2 shift, Olden contacted Laura Robertson (general manager) and Anthony Cuozzo (the chief operating officer who had been hired a few days earlier) by telephone regarding the fact that D. Bachand and Rodriguez had protested her decision not to allow D. Bachand to serve the customer. Robertson, after discussing the matter with Cuozzo, told Olden to issue warning notices to both Rodriguez and D. Bachand at the end of their shifts, and to suspend both servers for the rest of the week while the Respondent investigated the incident. Olden prepared a warning notice for Rodriguez and, after Rodriguez had clocked-out for the day, Olden asked her to come into the office. Rodriguez responded that she did not feel comfortable meeting with Olden without another manager present. At trial, Rodriguez testified that she had observed Olden preparing the disciplinary notice and was afraid that Olden would misrepresent their conversation if it was held without another manager present. Olden said "you have to," but Rodriguez declined to meet with Olden without another manager present and left the premises.[9]

On the same evening as the incident, Robertson sent text messages to Rodriguez and D. Bachand advising them that they had been taken off the schedule. When she received the message, Rodriguez telephoned Chatzopoulos, with whom she had worked closely in the past, intending to explain what had happened. Before Rodriguez was able to do so, Chatzopoulos yelled "you think you're a manager," and stated, "I'm going to the store and I'm going to check the cameras, and everybody is going to get fired."[10] He ended the call without allowing Rodriguez to provide an account. That night, Rodriguez sent an email addressed to Chatzopoulos, with copies to Bajko and Cuozzo, in which Rodriguez discussed her past service to the Respondent, including as a manager. She conceded that she probably did not have the right to question management, but that in her experience if Chatzopoulos had been present he

[9] The employee warning notice that Olden prepared on October and planned to give to Rodriguez stated that the offense was "insubordination / in front of other employees and guests." The description given is as follows:

> You approach me questioning why I made a decision to have another server take Denise B 's ex-husband When I expressed she was cut off the floor @ 1:00 pm and he came in @ 1:40. Saying you are going to call George and you can't wait to tell about me @ the meeting with the new [illegible] saying you were sick of me and tired dealing with me. Saying I may have the right but it turned a guest away. Wanting to argue on line about the decisions I made is unacceptable.

To the extent that this writing differs from Rodriguez's testimony about the incident I credit Rodriguez's testimony. The disciplinary notice was not a sworn statement, and Olden was not called as a witness to testify under oath and subject to examination by counsel.

[10] The record does not reveal whether there were, in fact, cameras at the facility that did record, or would be expected to have recorded, any of the events of October 2.

would have honored the customer's request. Rodriguez also stated that she believed honoring the request was consistent with customer service training the Respondent had recently provided to employees, and that by raising the matter she had not intended to interfere with Chatzopoulos' business but to "stand up" for it.

Chatzopoulos did not respond to this email, but Cuozzo responded in an email on the morning of October 3. Cuozzo testified that Chatzopoulos had directed him to investigate the incident. Unlike Chatzopoulos and Bajko with whom Rodriguez was well-acquainted, Cuozzo was a brand-new manager who was not familiar with Rodriguez. In the October 3 email, Cuozzo told Rodriguez that "[w]e need to ensure that the mgmt team is supported at all levels, from the lowest to the highest." He stated that "this occurrence will be thoroughly investigated," and that "there are certainly two sides to every occurrence." Robertson informed Rodriguez by email that the Respondent would meet with her at the Wethersfield restaurant on Thursday, October 5.

On October 4, Rodriguez sent an email to Bajko – a manager who Rodriguez knew well and who the Respondent had told her was a co-owner. In the email, Rodriguez asked Bajko to attend the upcoming meeting. Rodriguez stated she had talked to Chatzopoulos and Robertson about issues at the Wethersfield location multiple times prior to October 2, but that a promised meeting about those issues had not taken place. She also reported that "[i]t was brought to my attention yesterday that [Olden] was going around the store talking about the incident and saying: 'These servers better not think they are getting away with this, I have [Robertson and Cuozzo] on my side and servers are going to be moved around to other stores.'" Rodriguez copied Chatzopoulos, Cuozzo, and Robertson on this email to Bajko.

On October 4, within minutes of when Rodriguez sent the above email to Bajko, she received an email response – but from Cuozzo, not Bajko. Cuozzo's email stated:

> Rest assured, if the need arises you and I will indeed speak. I will not interfere with the daily management of a location unless I deem that it is necessary. Please trust that all employees will have the opportunity to tell their version of the incident, no prejudgment will occur. I will not engage in id[le] chatter and gossip regarding the incident and neither should you. Nor should you be discussing conversations the management team may or may not have had with other employees, unless you are witness to the conversations personally. People are going speculate and frankly, its non-one[']s business but those directly involved.
>
> Please allow the process to continue and allow Laura [Robertson] to conduct her inquiry.

(GC Exh. 7.) Cuozzo testified that, in this email, he was "restricting [Rodriguez] from speaking to anybody about this issue in total," and that there were two reasons for this. First, he stated that by speaking about the matter Rodriguez would "make things a bit more harder for us to get a clear idea of what happened." Second, he stated that he did not want Rodriguez "to advocate for everybody." (Tr. 274.) Bajko herself did not respond to Rodriguez's request that she attend the upcoming meeting, and did not, in fact, attend.

On Thursday, October 5, Cuozzo and Robertson met with Rodriguez at the Wethersfield restaurant. Chatzopoulos was present at the restaurant at the time but joined the meeting only after Rodriguez asked him to do so. Robertson asked Rodriguez what had happened, and Rodriguez began by raising some of the complaints about Olden that servers had included on the list they provided to management. In addition, Rodriguez complained that several weeks earlier, on September 18, a cook – Carlitos – had threatened her with physical violence, and that she told Olden,[11] but that Olden had not taken any action regarding the threat.[12] Cuozzo testified that, during the meeting, Rodriguez continued to raise the group complaints that servers had about Olden's management of the restaurant. (Tr. 257-258, 261-262.) Similarly, Robertson testified that Rodriguez had to be "refocused" from those complaints to narrowly address the events of October 2. Rodriguez described the incident and took issue with what she characterized as Olden turning away a regular customer. Cuozzo testified that Rodriguez was not apologetic and did not admit wrongdoing regarding the incident on October 2. At the end of the meeting, which lasted for approximately 15 to 30 minutes, Cuozzo told Rodriguez that she would remain off-the-schedule during further investigation.

As discussed above, Cuozzo testified that Chatzopoulos directed him to investigate the October 2 event. Regarding the particulars of his investigation, Cuozzo testified that he told Olden to reduce her complaint to writing, and then "reached out" to Olden and asked her to "reiterate" what was going on. (Tr. 255-256.) The documentary evidence includes the disciplinary notice that Olden prepared for Rodriguez on October 2 but does not include any other written complaint from Olden, nor does it include any document setting forth Cuozzo's account of what Olden said in response to his request that she "reiterate" the situation. Robertson and Cuozzo conducted the October 5 meeting, described above, in which they allowed Rodriguez to give her account of the incident. During that meeting, and with Chatzopoulos present, Rodriguez also raised the group complaints that servers had about Olden's conduct. That same day, Cuozzo and Robertson also met with D. Bachand. Cuozzo testified that D. Bachand was apologetic, "humble and accepted her role in the incident." Cuozzo contrasted this with Rodriguez, who was not apologetic. Cuozzo testified that his investigation was also "based" on Rodriguez's personnel folder. Cuozzo did not claim that he obtained the accounts of any other persons who may have witnessed what happened on October 2 between Rodriguez, D. Bachand, and Olden, but were not participants. At trial, Robertson testified that before making her recommendation she talked to assistant manager Joel Martinez. However, Robertson did not reveal what Martinez told her during this conversation, and there is no documentary evidence summarizing the interview. Martinez himself was not called as a witness.

[11] The Respondent's employee handbook has a section that encourages employees to report any threats of physical violence to management and states that employees who do so "will not be adversely affected as a result of reporting." (GC Exh. 4 at 9 to 10.) The same section states that in response to any such report, management "will take prompt investigatory actions and corrective and preventative actions where necessary."

[12] Rodriguez testified that, to her knowledge, no action was taken regarding the threat. Robertson testified that she investigated the threat and had told Rodriguez what she had done. To the extent that Rodriguez's and Robertson's testimonies are inconsistent on this point, I credit Rodriguez over Robertson's. On cross-examination, Robertson conceded that there was no documentation at all regarding an investigation of Rodriguez's report, that she did not remember when she told Rodriguez about her investigation or its results, and that she did not discipline anyone regarding the incident. (Tr. 201-202.)

According to Cuozzo, he "forwarded [his investigation] up for their recommendation." The documentary evidence does not include an investigation report from Cuozzo to Robertson, Chatzopoulos or anyone else in management. Rather, the next documentary evidence regarding the disciplinary investigation is Robertson's October 7 email to Chatzopoulos and Cuozzo in which she gave an account of the October 5 interviews with Rodriguez and D. Bachand and made recommendations for disciplining them. Regarding Rodriguez, Robertson stated:

> [Rodriguez] has had several other write ups for insubordination[13] and it seems like it will continue to be an ongoing issue. I truly believe that she has good intentions and does care about the company. She is a great server and a hard worker. Unfortunately, as [I] said before, I feel like the issue of being insubordinate will continue which is not conducive to having a strong and connected staff that works as a team. I think it is better off if we part ways.

(Respondent's Exhibit 9.)[14] Nothing in Robertson's email suggests that Rodriguez raised her voice on October 2, or that she created a disturbance in the presence of customers.

Regarding the interview with D. Bachand about the October 2 incident, Robertson's email stated, "I made it clear to [D. Bachand] that management should not be questioned." Regarding disciplinary action, Robertson stated that "I feel that [D. Bachand] understood where I was coming from," and "I would like to give [D. Bachand] another chance," but wanted to impose "one more week suspension so she can realize how serious it is," and that "if there any other incidents involving what we talked about she will be immediately terminated."

Cuozzo testified that the investigation showed that Rodriguez had been insubordinate on October 2. (Tr. 259-260.) He did not, however, identify any work that Rodriguez refused to perform or any management order that Rodriguez had failed to follow during her shift. He stated that he concurred with Robertson's recommendation that Rodriguez be discharged and that Chatzopoulos made the "ultimate" decision. Ibid. Chatzopoulos testified that, to the contrary, he did not make the final decision or instruct anyone else to discharge Rodriguez. (Tr. 275-276, 286-287.) Chatzopoulos first said that he let Cuozzo make the decision because he wanted

[13] The record shows that Rodriguez had two disciplinary write-ups that referenced insubordination, the most recent of which was issued on October 24, 2015, almost 2 years prior to when Robertson recommended her termination for the October 2, 2017 incident. Rodriguez received no disciplinary write-ups for insubordination, or anything else, during the period between the October 24, 2015, warning and the events of October 2, 2017. The prior disciplinary write-ups that Rodriguez received were as follows: 10/24/14 warning notice for failing to contact a manager when she provided the wrong dish to a customer; 11/2/14 warning for failing to notify a manager that a customer had specified an allergy issue when placing an order; 12/10/14 warning citing insubordination for making grits after being told that she could not help make grits; 6/15/15 two warnings on the same day for failing to properly report cash tips; and the aforementioned 10/24/15 final warning citing insubordination based on Rodriguez attempting to resolve a guest complaint without bringing it to a manager's attention.

[14] Robertson's email recommending Rodriguez's termination makes no mention of Rodriguez's complaint that Carlitos threatened her with physical violence. At trial, however, Robertson asserted that the Rodriguez-Carlitos matter was one of the reasons that she recommended Rodriguez's discharge.

Cuozzo to have "the opportunity to be the boss." (Tr. 275-276.) Later Chatzopoulos stated that the decision was made by Robertson and Cuozzo together. (Tr. 286-287.)

In an email on October 8, 2017, Robertson informed Rodriguez that she was discharged. The body of the October 8 email reads in its entirety:

> After the discussion on Thursday with Anthony [Cuozzo] and George [Chatzopoulos], we have decided that it would be better for us to part ways. We appreciate everything you have done with and for our company over the years, but we feel like this will [be] in the best interest for both parties. We wish you luck on your future endeavors. If there are any questions please contact Anthony [Cuozzo, email address].
>
> Keep in touch.

(GC Exh. 8.) Three days later, on October 11, Rodriguez sent an email to Cuozzo in which she referenced Robertson's October 8 communication and asked to know what led to her termination. Cuozzo never responded to this email or otherwise provided Rodriguez with a reason why the Respondent decided that her discharge was "in the best interest for both parties." The record does not show that anyone else at the Respondent told Rodriguez the specific basis for her discharge.

Two months after the Respondent discharged Rodriguez, it discharged Olden. Olden's employment with the Respondent lasted about 6 months.

3. Reasons Given at Trial for Respondent's Decision to Discharge Rodriguez

In their trial testimonies, Robertson and Cuozzo provided explanations for Rodriguez's termination that go beyond those discussed in the Respondent's contemporaneous documentation and/or are inconsistent with what the record shows happened on October 2. Both claimed that one of the bases for the Respondent's disciplinary response to the October 2 exchange was that Rodriguez got loud, or yelled, at Olden in front of customers and other employees. (Tr. 189, 214-215, 269-270.) As noted above, Rodriguez did not raise her voice to Olden and the exchange took place in an area that was out of view of customers. The Respondent did not present testimony from anyone who was a witness to the October 2 interaction to support the assertion that Rodriguez yelled or created a disturbance that was visible to customers. The Respondent did not even present supporting documentary evidence – such as investigatory reports or written accounts from persons who witnessed the exchange – to support Robertson's and Cuozzo's claim that Rodriguez raised her voice. The disciplinary write-up that Olden prepared states that Rodriguez said she was sick of Olden and was looking forward to raising matters with Chatzopoulos but did not claim that Rodriguez raised her voice. Similarly, Robertson's email recommending that Rodriguez be discharged – the closest thing to an investigative report that the Respondent presented at trial – does not suggest that Rodriguez raised her voice or that the exchange occurred in front of customers. In the absence of such testimony or documentary evidence I give no weight to the Robertson's and Cuozzo's hearsay testimony that Rodriguez had yelled at Olden in the presence of customers. Based on my review

of the record evidence I find not only that Rodriguez did not in fact raise her voice in front of customers, but also find that Robertson and Cuozzo were not shown to have a reasonable basis for believing that she had done so at the time they disciplined her The testimony of Robertson and Cuozzo to that effect was self-serving, contrary to the competent evidence about what actually occurred, and undercut by the absence of any mention of Rodriguez raising her voice in the documentary evidence from the time of the discharge decision.

Robertson testified that the decision to discharge Rodriguez was also based, in part, on her interaction with a cook, Carlitos, on September 18. (Tr. 208.) That interaction concerned an instance in which Rodriguez tried to expedite a delayed food order by giving the order to Carlitos in writing so that he could begin preparing it prior to her entering the order into the restaurant computer. The Respondent's procedure was that orders to the kitchen had to be submitted using the computer. Carlitos declined to begin preparing the food based on the written order and instead waited for Rodriguez to finish entering the order into the computer. Rodriguez objected, including by telling Carlitos that he was "being very immature" and that customers were waiting. Rodriguez did not raise her voice,[15] but Carlitos responded by making statements that Rodriguez understood as threats of physical violence. The next day, Rodriguez sent an email to Chatzopoulos stating that she had tried to get Olden to take action about the threats and asking Chatzopoulos to deal with the situation before it escalated. Subsequently, at the October 5 meeting Rodriguez raised Olden's handling of the September 18 threat as an example of management problems at the Wethersfield location.

Robertson testified that she investigated the September 18 incident and that she did not impose any discipline as a result of it. (Tr. 201-202.) Contradicting her own statement that she did not impose discipline, Robertson claimed at trial that the disciplinary action against Rodriguez was based in part on the September 18 incident. It is surprising to me that Robertson would raise Rodriguez's own report that Carlitos threatened her with physical violence – a report that Robertson does not suggest was false – in an effort to support the decision to discipline Rodriguez (not Carlitos). It is particularly surprising in light not only of the fact that Robertson made no mention of that incident in her October 7 email explaining her recommendation to discharge Rodriguez , but also of the fact that the Respondent has an express policy that employees "will not be adversely affected as a result of reporting" such threats, (GC Exh. 4, at 9 to 10) and of the fact that Robertson conceded that she did not impose *any* discipline based on the September 18 incident. I find that the Respondent was not contemplating any disciplinary action against Rodriguez based on the September 18 incident and that the decision to discharge Rodriguez was not based on the September 18 incident.

4. Comparative Discipline

The parties presented evidence regarding discipline that the Respondent issued to other employees. This includes documentation of multiple instances in which the Respondent

[15] Rodriguez was the only witness to this incident who testified, and she clearly and credibly stated that she had not raised her voice during the exchange. (Tr. 165-166.) Nevertheless, Counsel for the Respondent makes the frivolous claim that Rodriguez not only raised her voice but did so in the presence of customers. Brief of Respondent at Page 4. I reject that claim which is unsupported by competent evidence.

disciplined other employees for insubordination or arguing with a manager.[16] In none of those instances was the employee terminated for the offense and, indeed, Robertson conceded that she was not aware of anyone other than Rodriguez who the Respondent had ever terminated for insubordination. In most cases the individual received a warning. This included some cases of conduct that was facially more severe than what Rodriguez was disciplined for. For example, on September 15, 2018, the Respondent issued a warning to a dishwasher who raised his voice and threw a syrup bottle at the wall in section of the restaurant where customers are served. (GC Exh. 20.) On October 3, 2017, the Respondent issued a warning to an employee who appeared intoxicated, was belligerent, and stormed out of the restaurant without finishing his duties. Ibid. Close in time to the Rodriguez's discipline, the Respondent, on October 9, 2017, issued a warning to a server who argued with Olden about a work direction. Ibid. D. Bachand, received a suspension, not termination, for her part in protesting Olden's refusal to grant a regular customer's request to be served by D. Bachand. Ibid. The record shows that the Respondent consistently allowed employees off with a warning even when the employee was rude in the presence of customers, or even to customers, and even when a customer complained to management. (GC Exh. 24.)

The only employee other than Rodriguez who the Respondent showed that it had discharged for disciplinary reasons was an employee who threatened to assault other employees and to return to the facility with a weapon. (GC Exh. 22.) The Respondent took those threats seriously enough that it summoned police to the facility. Ibid.

ANALYSIS

A. DISCHARGE OF RODRIGUEZ

The Complaint alleges that Rodriguez had, since about August 2017, engaged in protected concerted activity with other employees by criticizing Olden's conduct as assistant manager and Olden's treatment of a coworker, and that the Respondent violated Section 8(a)(1) by discharging Rodriguez on October 8, 2018 because she engaged in that protected activity.

The first question is whether Rodriguez engaged in concerted activities protected by the Act. An employee engages in protected concerted activity when he or she acts "'with or on the authority of other employees and not solely by and on behalf of the employee himself.'" *Entergy Nuclear Operations*, 367 NLRB No. 135, slip op. at 12 (2019), quoting *Meyers Industries,* 268 NLRB 493, 496-497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), on remand, *Meyers Industries,* 281 NLRB 882 (1986) (*Meyers II*), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The evidence shows that the Respondent engaged in such activity. The most clear-cut instance occurred when, during the August or September before her termination, Rodriguez gathered with other servers to compile the servers' list of complaints about Olden's management of the restaurant and then Rodriguez personally transmitted that list to management. The list, which is set forth in its entirety in the statement of facts, includes multiple complaints that Olden

[16] The Respondent's employee handbook lists "insubordination or other disrespectful conduct" as being prohibited by its rules of conduct) but does not define insubordination or set forth a schedule of progressive disciplinary responses to such conduct. (GC Exh. 4 at 29.)

was shirking work in ways that placed increased burdens on the servers. For example, Olden was said to be failing to seat guests, failing to "help servers when slammed," and choosing to take her own meal break during the rush period. The servers also complained that Olden "caused conflicts with servers," and in particular that she had "something against" D. Bachand. Olden's alleged mistreatment of D. Bachand directly affected the terms and conditions of other servers because, inter alia, the treatment sometimes led D. Bachand to become so upset that she could not carry out her duties and other servers had to add some of her workload to their own. By creating a list of group complaints and presenting it to management, the participating servers, including Rodriguez, were engaging in the sort of "concerted activities for . . . mutual aid or protection," that is expressly protected by Section 7 of the Act, and the Board has consistently recognized similar group protests as such. *Rhee Bros., Inc.*, 343 NLRB 695 fn. 3 (2004); *Superior Travel Service*, 342 NLRB 570, 574 (2004); *Astro Tool & Die Corp.*, 320 NLRB 1157, 1162 (1996), and *Brother Industries*, 314 NLRB 1218 (1994) *Liberty Natural Products, Inc.,* 314 NLRB 630, 638 (1994); *Meyers Industries,* 268 NLRB at 497. In *Hacienda Hotel, Inc.*, for example, the Board affirmed that employees engaged in protected activity by collectively complaining to a manager about her alleged mistreatment of two coworkers, because "group complaints about the quality of supervision are directly related to working conditions and fall within the 'rubric' of protected concerted activities." 348 NLRB 854, 864 (2006). And, in *Kysor Industrial Corp.,* for example, the Board determined that disciplining employees for collectively inquiring about work assignments violated Section 8(a)(1), and that the employees' Section 7 protections attached, notwithstanding that the employer may not have understood the legal consequences of its actions. 309 NLRB 237, 237-238 (1992).

I find that Rodriguez also engaged in protected concerted activity on October 2 when she protested that Olden had discriminatorily refused to allow D. Bachand to serve a customer who requested to be served by her. This was concerted activity not only because Rodriguez and D. Bachand had discussed their concerns before Rodriguez raised them with Olden, but also because it grew out of the earlier list of complaints that the servers had created and that Rodriguez had personally delivered to management – specifically the item complaining that Olden "has something against" D. Bachand. The Board has held that even a lone employee's protest to management is concerted activity where, as here, it "grew out of [an] earlier concerted complaint regarding the same subject matter." *JMC Transport*, 272 NLRB 545, fn. 2 (1986), enfd. 776 F.2d 612 (6th Cir. 1985). Rodriguez was acting with other employees – both D. Bachand and the other servers who created the list of complaints – when she made her complaint to Olden on October 2. Rodriguez's protected activity extended to the interview on October 5 when, as Cuozzo conceded, Rodriguez continued to advocate on behalf of a group of servers.

The Respondent defends its decision to discharge Rodriguez by raising Rodriguez's conduct in the course of otherwise protected activity on October 2. Where, as here, an employer defends its discipline of an employee by raising the employee's conduct in the course of otherwise protected activity, the Board's decision in *Atlantic Steel Co.*, 245 NLRB 814 (1979), provides the appropriate analytic framework for determining whether the discipline is discriminatory in violation of Section 8(a)(1).[17] See also *Entergy Nuclear*, above, *Lou's*

[17] Recently, the Board issued a notice and invitation to file briefs in *General Motors, LLC*, 360 NLRB No. 68 (September 5, 2019). In so doing, the Board seeks public input regarding whether to reconsider the application of *Atlantic Steel*, above, in factual situations where an employee is disciplined for outbursts in

Transport, Inc., 361 NLRB 1446 (2014); *United States Postal Service*, 360 NLRB 677 (2014), *Aluminum Co. of America*, 338 NLRB 20, 22 (2002).[18] Under *Atlantic Steel*, since the Respondent defends the discharge of Rodriguez by reference to her October 2 protest to Olden, the question is whether in the course of that otherwise protected activity Rodriguez engaged in conduct that was so egregious or opprobrious as to cause her to forfeit the Act's protection. *Desert Springs Hospital Medical Center*, 363 NLRB No. 185, slip op. at 13 (2016); *Aluminum Co. of America*, 338 NLRB 20, 22 (2002); *Atlantic Steel Co.*, above. See also *Lou's Transport, Inc.*, above; *United States Postal Service*, above. The determination about whether an employee's conduct in the course of otherwise protected activity is sufficiently egregious or opprobrious to forfeit the Act's protection is based on a balancing of four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, above at 816; see also *Entergy Nuclear Operations,* above (same), *Meyer Tool, Inc.*, 366 NLRB No. 32, slip op. at 1 fn. 2 (2018) (same), *United States Postal Service*, above at 677 fn. 2 and 683 (2014), and *Stanford Hotel*, 344 NLRB 558 (2005) ("When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act."). This framework balances employees' rights under the Act and the employer's interests in maintaining workplace order and discipline. *Triple Play Sports Bar & Grille*, 361 NLRB 308 (2014), affd. by summary order 629 Fed.Appx. 33 (2d Cir. 2015); see also *Piper Realty*, 313 NLRB 1289, 1290 (1994) ("[E]mployees are permitted some leeway for impulsive behavior when engaging in concerted activity, [but] this leeway is balanced against an employer's right to maintain order and respect.").

I find that the first factor under *Atlantic Steel* – the place of the discussion – weighs in favor of finding that the Rodriguez did not forfeit the protection of the Act in the course of her protected protest to Olden. Rodriguez addressed Olden in the server aisle, an area that was separated from where customers were situated, and which servers and managers used for work-related discussions. Due to the presence of a wall/partition, Rodriguez and Olden were out of view of customers during the exchange in the server aisle. In addition, since Rodriguez did not

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the course of union or protected-concerted activity that involve the use of profanity, vulgarity, or racially or sexually offensive language. As discussed in detail herein, there is no allegation and, certainly, an absence of any evidence to suggest, that Rodriguez engaged in statements that involved vulgarity, profanity, or racially or sexually offensive language. Therefore, I proceed in applying *Atlantic Steel* and related cases here, which, in any case, remain current Board precedent pending reconsideration of the issues in the *GM* case.

[18] The Respondent attempts to muddy the waters by referencing the circumstances of Rodriguez's complaint that she was threatened by a cook on September 18, and by revisiting disciplinary warnings that Rodriguez received approximately 2 to 3 years earlier. I find that those are red herrings that had nothing to do with the Respondent's decision to initiate disciplinary action against Rodriguez. The Respondent does not claim, and the evidence does not show, that the Respondent was contemplating disciplinary action against Rodriguez prior to her protected protest on October 2. After Cuozzo and Robertson received Olden's report, the Respondent immediately suspended Rodriguez from the schedule and never permitted her to return to work. Even if the September 18 incident or the stale prior discipline had some bearing on the level of discipline the Respondent settled upon, the fact remains that the Respondent defends the discharge based on Rodriguez's protected activity on October 2 and does not claim, and cannot reasonably claim on the record here, that it would have disciplined her in the absence of that activity.

raise her voice, and no customers complaints were received about the exchange, it is reasonable to infer that customer experience was not negatively impacted by Rodriguez's protected activity. There was no evidence that employees other than D. Bachand (who had herself already approached Olden and Rodriguez about the matter) were aware of the exchange. The evidence suggests that the place of the exchange did not cause an undue burden on the Respondent's "interests in maintaining workplace order and discipline." *Triple Play*, above.

The subject matter of the discussion also weighs in favor of continued protection. Rodriguez and D. Bachand were protesting an instance of what they perceived as Olden's mistreatment of D. Bachand, a matter a group of servers considered so significant that they included it first in the list of complaints that they had recently submitted to the Respondent. Collectively complaining to a manager about his or her alleged mistreatment of coworkers is "directly related to working conditions and fall[s] with the 'rubric' of protected concerted activities." *Hacienda Hotel*, 348 NLRB at 864.

The third factor – "the nature of the outburst" – also weighs in favor of continued protection. In fact, Rodriguez's protest does not, in my view, even rise to the level of an "outburst." She protested Olden's treatment of D. Bachand without raising her voice and in an area of the facility where servers and managers could, and did, communicate out of the presence of customers. There is no suggestion that she used vulgar language or that she threatened violence or other inappropriate conduct. When Olden rebuffed Rodriguez by stating "I'm the manager, I make the decisions," Rodriguez responded that she would be discussing the matter during a future meeting with management. Moreover, although Rodriguez was critical of Olden and made the protest in the workplace, she was not insubordinate in the sense of failing to comply with a management directive during her work time. To the contrary, after communicating the protest, she returned to her duties and completed her shift. The way Rodriguez conducted herself during the exchange was measured and appropriate and weighs heavily in favor of continued protection.

The fourth factor, whether the "outburst was, in any way, provoked by an employer's unfair labor practice," weighs neither for nor against continued protection. It is true that the evidence does not show that Rodriguez was provoked by an unfair labor practice, since it was not shown that Olden's treatment of D. Bachand was an unfair labor practice. On the other hand, the analysis under this factor is not confined to circumstances in which the employer's provocation is actually alleged to be an unfair labor practice. *Nexteer Automotive Corp.*, 368 NLRB No. 47, slip op. at 10 (2019); *Meyer Tool, Inc.*, above, slip op. at 13; *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1429 (2007); *Overnite Transportation Co.*, 343 NLRB 1431, 1438 (2004). In this instance, Rodriguez's protest was provoked by what she believed to be another example of Olden's unfair treatment of a coworker, a matter that a group of servers had already complained about to management.

In summary, I find that the first three *Atlantic Steel* factors, taken together, weigh heavily in favor of continued protection and that the fourth factor is neutral. Even if one believes that the fourth factor weighs against continued protection, it does so only lightly and would be easily outweighed by the three factors favoring continued protection. Therefore, I find that Rodriguez did not forfeit the Act's protection for her otherwise protected activity on October 2.

Counsel for the Respondent, in the post-hearing brief, attempts to justify Rodriguez's discharge through relentless repetition of the assertion that Rodriguez yelled in front of customers. Apparently, the Respondent's counsel believes that such repetition can take the place of competent evidence. The only competent, nonhearsay, evidence credibly establishes that Rodriguez did not raise her voice and that the exchange was not in the presence of customers. At any rate, Robertson and Cuozzo made statements indicating that the real source of their conviction that Rodriguez had forfeited the Act's protection was their view that an employee forfeits protection by questioning a manager. In Robertson's October email explaining her disciplinary recommendations, she stated that "management should not be questioned." In Cuozzo's email to Rodriguez in the hours after her suspension, he stated that "[w]e need to ensure that the mgmt. team is supported at all levels." At trial he explained his actions in part by stating that he did not want Rodriguez to "advocate for everybody" and that during the October 5 meeting Rodriguez raised problems that a group the servers supervised by Olden were having. Contrary to Robertson's and Cuozzo's views, when an employee presents management with group complaints that seek to improve the group's lot as employees, that employee is not engaged in misconduct that vitiates the Act's protections, but rather, he or she is engaged in precisely the sort of conduct that the Act protects.

Since the Respondent discharged Rodriguez based on her conduct while engaged in otherwise protected activity on October 2, 2017, and since her conduct in the course of that activity did not cause her to forfeit the Act's protection, the Respondent's decision to discharge Rodriguez violated Section 8(a)(1) of the Act.[19]

[19] The Respondent makes no mention of *Atlantic Steel* in its brief and makes only passing reference to the Board's decision in *Wright Line*, which sets forth a different mode of analysis. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The *Wright Line* analysis is not appropriate where, as here, the employer defends the disciplinary action based on conduct that is part of the res gestae of the employee's otherwise protected concerted activity. *Entergy Nuclear Operations*, 367 NLRB No. 135, slip op. at 1 fn. 1 (2019). Even if *Wright Line* were the proper mode of analysis it would not change the result here. The evidence establishes that hostility towards Rodriguez's protest on October 2 was a motivating factor in her discharge not only because the Respondent readily admits that it was, but also because of statements that Robertson and Cuozzo made to explain their actions. As noted previously, Robertson explained her disciplinary recommendations by stating that "management should not be questioned" and that Rodriguez had failed to learn that management "was not to be questioned in the moment." Similarly, Cuozzo explained actions he took relative to Rodriguez's October 2 protest by stating that he did not want Rodriguez to "advocate for everybody."

Relevant to a *Wright Line* analysis, it is also clear that the Respondent has failed to show that it would have taken the same action for legitimate reasons even if Rodriguez had not engaged in her protected activity. As is summarized in the statement of facts, the record shows that there were multiple other instances in which the Respondent disciplined an employee for purported insubordination, but that Rodriguez was the only one of those employees upon whom it imposed the ultimate sanction of discharge. In fact, the Respondent issued only a warning in cases where the employee's insubordination was facially more extreme, not only than anything that Rodriguez did, but was more extreme than anything that the Respondent inaccurately asserts that she did. For example, an employee received only a warning for insubordination after he raised his voice and threw a bottle against a wall in the section of the restaurant where customers were served. Moreover, although the Respondent tries to resurrect 2 to 3-year old disciplinary warnings against Rodriguez the Respondent had long treated that discipline as stale. In the summer of 2016, subsequent to all the prior disciplinary actions against Rodriguez, the Respondent

B. CUOZZO'S OCTOBER 4 EMAIL

The General Counsel also alleges that Cuozzo's October 4 email to Rodriguez violated Section 8(a)(1) of the Act by prohibiting employees from discussing work-related incidents with other employees. Employees have a right under the Act to talk to other employees about matters under investigation and an employer interferes with that right by instructing employees not to do so. *The Boeing Company*, 362 NLRB 1789, 1797 (2015); *Hyundai America Shipping Agency,* 357 NLRB 860 (2011), rev. in part on other grounds, 805 F.3d 309 (D.C. Cir. 2015); *Bryant Health Center, Inc.*, 353 NLRB 739 (2009); *SNE Enterprises, Inc.*, 347 NLRB 472 (2006); *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999). See also, *Verizon Wireless*, 349 NLRB 640, 640 fn. 5 and 658 (2007) (Employer violated Sec. 8(a)(1) by prohibiting employees from discussing discipline they had received.) When an employer interferes with that right it may escape a finding of violation by demonstrating a legitimate and substantial business justification that outweighs the employee's interests under Section 7. See, e.g., *Verizon Wireless*, above at 658; *Ang Newspapers*, 343 NLRB 564, 565 (2004); *Caesar's Palace*, 336 NLRB 271, 272 fn. 6 (2001); see also *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 494-495 (1978) (The Board's task is to balance the employees' Section 7 right to communicate against the employer's right to protect its business interests.)

In this case, I find that Respondent has not demonstrated that its interference with employees' right to discuss matters under investigation was outweighed by the demonstration of a legitimate and substantial business justification. I note that the burden the Respondent placed on employees' rights to communicate about the investigation was particularly heavy since Cuozzo did not limit the restriction by either time or place. Cuozzo did not state, for example, that the restriction on employees discussing manager's statements would only apply until the investigation was completed. Rather, on its face, Cuozzo's email imposes an open-ended prohibition on employees discussing the matter at any time during or after the investigation. *SNE Enterprises*, 347 NLRB 472, 472 fn. 4 and 492-493 (2006) (confidentiality rule that applies after the investigation is completed cannot be justified "to protect the sanctity of an ongoing investigation"), enfd. 257 Fed. Appx. 642 (4th Cir. 2007). Nor did Cuozzo limit the prohibitions to discussions taking place in the Respondent's workplace, but rather made a broad pronouncement that, on its face, prohibits an employee from discussing the matter with coworkers even on their own time in their own homes. Cuozzo did not even use language clearly limiting the prohibition to discussions about the current investigation, but rather spoke in general terms – prohibiting Rodriguez from "discussing conversations the management team may or may not have had with other employees."

At trial, Cuozzo testified that the restriction was necessary for two reasons. One of his stated reasons was that employee conversations would "make things a bit more harder for us to get a clear idea of what happened." Cuozzo did not identify anything about this particular investigation that made the tainting of witnesses a problem. See *Banner Health System*, 362 NLRB 1108, 1009 (2015) (Before prohibiting employees from discussing a matter under

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promoted Rodriguez to assistant manager. In addition, the record evidence leaves no doubt that Rodriguez's September 18, 2017 interaction with a cook would not have resulted in any discipline at all. Robertson admitted as much, testifying that no disciplinary action was taken as a result of that incident and making no mention of it in her October 7 email recommending Rodriguez's discharge.

investigation, employer has the responsibility to "determine whether in any given investigation . . . . corruption of its investigation would likely occur without confidentiality."). To the contrary, the evidence shows that Cuozzo and the Respondent did not conduct the type of investigation where such taint would be a pressing concern. For example, the Respondent does not appear to have sought the accounts of any witnesses to the October 2 interaction besides the three who participated in it. Therefore, Cuozzo would have only limited legitimate concern about Rodriguez tainting other witnesses to the event by encouraging them to harmonize their accounts with her own. Even if the potential for witnesses to corrupt one another's accounts during the investigation was a legitimate concern here, it would not justify the Respondent's imposition of a restriction that was not limited to the time period or the subject matter of the investigation. *SNE Enterprises*, above. The second reason that Cuozzo provided for imposing the prohibition was that he did not want Rodriguez "to advocate for everybody." This is not a legitimate reason, but rather further evidence of unlawful discrimination. Rodriguez engaged in protected concerted activity by bringing group concerns to the attention of management. The fact that interference with that protected activity was not merely a side effect of the prohibition that Cuozzo imposed on October 4, but one of its stated objectives, weighs further in favor of finding that the burden it placed on employee's communications about work-related matters was not outweighed by legitimate business justifications.

I find that the Respondent violated Section 8(a)(1) of the Act when, on October 4, 2017, Cuozzo informed Rodriguez by email that employees were prohibited from discussing work-related incidents and managers' statements to them with other employees.

C. TIMELINESS OF OCTOBER 4 EMAIL ALLEGATION

In its brief, the Respondent does not dispute that on April 2, 2018, Rodriguez filed a timely charge regarding her October 8, 2017 discharge. However, the Respondent contends that the allegation that Cuozzo's October 4, 2017 email interfered with employees' rights to discuss matters under investigation was untimely because it was raised for the first time in the May 24, 2018, amendment to the original charge and more than 6 months after October 4, 2017. Under Section 10(b) of the Act an allegation of an unfair labor practice is generally untimely if a charge regarding it is not filed within 6 months of the conduct alleged to constitute an unfair labor practice. However, the Supreme Court has held that a complaint may encompass any matter sufficiently related to or growing out of conduct alleged in a timely charge. *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959); *National Licorice Co. v. NLRB*, 309 U.S. 350, 369 (1940). Following this, the Board has recognized that an allegation raised outside the 6-month period is still timely if it is "closely related" to allegations in a timely filed charge. *Redd-I, Inc.,* 290 NLRB 1115 (1988); see also *UPS Supply Chain Solutions, Inc.*, 366 NLRB No. 111 (2018) and *Fry's Food Stores,* 361 NLRB 1216, 1217 (2014). In this case I find that the allegation regarding Cuozzo's October 4 email to Rodriguez is closely related both factually and legally to the allegation regarding Rodriguez's discharge that was set forth in the timely charge. Cuozzo's email was expressly about the process that led to Rodriguez's discharge and was part of the same course of events. In addition, the email evidences the same antagonism by Respondent towards Rodriguez's protected activity that unlawfully motivated the discharge decision challenged in the timely charge. Both claims allege a violation of the same provision of the Act – Section 8(a)(1). Both concern actions against the same employee – Rodriguez. For

these reasons, I find that the claim based on Cuozzo's October 4 email is closely related to the allegation in the timely charge, and that the Respondent's timeliness defense is not meritorious.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent discriminated in violation of Section 8(a)(1) of the Act on October 8, 2017, when it discharged Rodriguez based on her protected concerted activity.

3. The Respondent violated Section 8(a)(1) of the Act when, on October 4, 2017, Cuozzo informed Rodriguez by email that employees were prohibited from discussing with other employees work-related incidents and managers' statements.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent must, inter alia, offer Rodriguez full and immediate reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as set forth in *Kentucky River Medical Center,* 356 NLRB 6 (2010). The Respondent shall compensate Rodriguez for any adverse tax consequences of receiving a lump-sum backpay award and to file a report with the Regional Director for Region One allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

In addition, the Respondent shall compensate Rodriquez for her search-for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in rel. part 859 F.3d 23 (D.C. Cir. 2017). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[20]

ORDER

The Respondent, Chip's Wethersfield, LLC d/b/a Chip's Family Restaurant, its officers, agents, successors, and assigns, shall

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in protected concerted activity.

(b) Prohibiting employees from discussing with other employees work-related incidents and statements by managers.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Jacqueline Rodriguez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Jacqueline Rodriguez whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

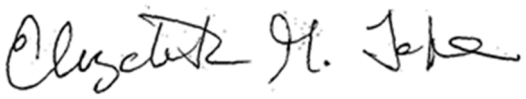
(c) Compensate Jacqueline Rodrigues for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region One within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Jacqueline Rodriguez in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Wethersfield, Connecticut, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region One, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2, 2017.

Dated, Washington, D.C., September 25, 2019



Elizabeth M. Tafe
Administrative Law Judge

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activities.

WE WILL NOT prohibit you from discussing with other employees work-related incidents and statements made by managers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jacqueline Rodriguez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Jacqueline Rodriguez whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

WWE WILL compensate Jacqueline Rodriguez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region One, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge, and within 3 days thereafter notify Jacqueline Rodriguez in writing that this has been done and that the discharge will not be used against her in any way.

CHIP'S WETHERSFIELD, LLC D/B/A
CHIP'S FAMILY RESTAURANT

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, 6th Floor, Boston, MA 02222–1072
(617) 565-6700, Hours of Operation: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-217597 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (617) 565-6701.